INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	5
Argument	7
Conclusion	12

CITATIONS

Cases:	
Arizona v. *California*, 283 U. S. 423	10
Ivanhoe Irrigation District v. *McCracken*, No. 122, Oct. Term, 1957	10
Oklahoma v. *Atkinson Co.*, 313 U. S. 508	7
United States v. *Appalachian Power Co.*, 311 U. S. 377	7
Blackmar v. *Guerre*, 342 U. S. 512	11
Statutes:	
Boulder Canyon Project Act, 45 Stat. 1057	10
Federal Water Power Act, 41 Stat. 1063, 1077	10
Flood Control Act of 1936, 49 Stat. 1570	6
Flood Control Act of 1944, 58 Stat. 887, Section 1	10
Public Works Appropriation Bill, House Report No. 1085, adopted in Public Law 163, 84th Congress, 1st Session	6
Public Works Appropriation Bill, House Report No. 2413, adopted in Public Law 641, 84th Congress, 2d Session	7
Reclamation Act of June 17, 1902, 32 Stat. 390, Section 8	10
Rivers and Harbors Act of 1945, 59 Stat. 10	2-5, 6, 8-9, 10, 11
Section 1 (a)	2, 8, 9
Section 1 (b)	4, 8, 9
Section 1 (c)	8, 9
Section 2	5, 6, 11

473439—58

Statutes—Continued
Page
Submerged Lands Act of 1953, Section 1311 (d), 67 Stat. 29, 30; 43 U. S. C. 1311 (d) 10
Water Pollution Control Act of 1948, 62 Stat. 1155 .. 10
Miscellaneous:
Cong. Rec., daily ed., June 19, 1958, pp. 10635–10637 . 7
Senate Document No. 98, Seventy-sixth Congress, 1st Session 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 121

NECHES RIVER CONSERVATION DISTRICT, PETITIONER

v.

BRIGADIER GENERAL L. E. SEEMAN, DIVISION ENGINEER, SOUTHWEST DIVISION, CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 252 F. 2d 327.

JURISDICTION

The judgment of the Court of Appeals was entered February 13, 1958. Rehearing was denied March 27, 1958. The petition for a writ of certiorari was filed June 23, 1958. The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Rivers and Harbors Act of 1945 requires that a permit be obtained from the State of

Texas as a condition precedent to the construction in Texas by the United States of a dam in navigable waters of the United States.

STATUTE INVOLVED

All of the pertinent provisions of the Rivers and Harbors Act of 1945, 59 Stat. 10, are set forth in Appendix A to the petition at pages A1–A5. Those most directly involved are:

> [SEC. 1.] * * * [I]n connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> In conformity with this policy—
>
> (a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works

of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. * * * The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basis involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the

affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachment shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

* * * * *

SEC. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein:

* * * * * *

Neches and Angelina Rivers, Texas; Senate Document Numbered 98, Seventy-sixth Congress; * * *

STATEMENT

This is a suit by a Texas conservation district to enjoin the construction by respondents of McGee Bend Dam and Reservoir on the Angelina River in Texas. Respondents are the Division Engineer of the Southwest Division, Corps of Engineers, and the District Engineer of the Fort Worth District of that Division. The United States is not a party to the suit. The complaint filed in the District Court seeks an injunction and a declaration that respondents' actions, actual or contemplated, are illegal because respondents have failed to secure the permission of the Board of Water Engineers of Texas in order to build the dam, as it claimed is required by the Rivers and Harbors Act of 1945, 59 Stat. 10.

The record indicates that Congress has considered a flood control program for the Neches River and its

tributaries for many years.[1] Section 2 of the Rivers and Harbors Act of 1945 authorizes the construction of McGee Bend Dam and Reservoir "in accordance with the plans" contained in Senate Document No. 98, Seventy-Sixth Congress, 1st Session, 59 Stat. 10, 18; Petition, Appendix A, page A5. The document, which is a report of the Chief of Engineers, recommends (and the Act authorizes) the construction of two large dams, one on the Neches River at Rockland and the other at McGee Bend, and two smaller, re-regulating dams on the Neches below Rockland. The entire project is to be constructed in satisfaction of the following stated aims:

> * * * First, to control floods from the upper basin, thereby reducing flood losses in the lower valley and benefiting navigation below Beaumont; and second, to regulate stream flow, thereby making available needed water supplies for the area in the vicinity of Beaumont, providing depths in the Neches River above Beaumont suitable for shallow-draft navigation, and making possible the development of a substantial block of hydroelectric power. * * * [Senate Document No. 98, page 5.]

Since completion of one of the smaller dams in 1951, Congress has appropriated some $5,500,000 for the construction of McGee Bend. (See Public Works Appropriation Bill, House Report No. 1085, adopted

[1] The Flood Control Act of 1936, 49 Stat. 1570 at 1592, 1593, authorized the Secretary of War to make preliminary examinations and surveys for flood control on the Neches River and its tributaries. Senate Document No. 98 is a report of the Chief of Engineers in response to a resolution of the Committee on Commerce of the Senate, adopted April 5, 1939.

in Public Law 163, 84th Congress, 1st Session, and Public Works Appropriation Bill, House Report No. 2413, page 11, adopted in Public Law 641, 84th Congress, 2d Session.) The most recent action has been the rejection by the House, after debate, of an amendment to the Public Works Appropriation Bill for 1959 which would have eliminated the power feature of McGee Bend Dam. (Cong. Rec., daily ed., June 19, 1958, pages 10635–10637.)

Respondents filed a motion to dismiss, alleging some six separate grounds (R. 21). The motion was granted by the District Court on February 25, 1957. The Court of Appeals, holding that the Rivers and Harbors Act of 1945 does not require the Government to obtain the permission of the Texas Board of Water Engineers before building the dam, affirmed the judgment of dismissal on February 13, 1958.

ARGUMENT

1. The Neches River is a navigable river. The Angelina, on which the Government plans to build McGee Bend Dam, is its principal tributary. Floods are comparatively frequent on the Neches and the Angelina (Senate Document No. 98, page 3). The primary purposes to be served by McGee Bend are flood control and navigation (Statement, *supra*, page 6), which are, of course, proper Federal functions. *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

Thus there can be no doubt of the power of Congress to authorize this very dam against the building of which petitioner seeks an injunction. Petitioner,

indeed, does not deny the power, but contends that by a limitation, self-imposed, Congress has required the Chief of Engineers, in building any of the dams authorized by the Rivers and Harbors Act of 1945, to conform to local licensing laws and other regulations of the states relative to the use of waters. The opinion below correctly overruled petitioner's contention.

There is no language in the Act which requires any officer of the Government to obtain the permission of the state or to proceed in conformity with state law. Petitioner has built its whole case on an inference from certain language of policy contained in section one of the Act. The inference is unwarranted and is plainly refuted not only by the succeeding provisions of the Act, but by the language of the policy statement itself.

The opening paragraph of section one of the Act, *supra*, p. 2, recites a Congressional policy to be specifically applied under subsections (a), (b), and (c). In general, this is a policy of recognition of states' interests and rights, with particular emphasis in the last clause on the construction of navigation works in such a way as will not interfere with "appropriate and economic use of the waters of such rivers by other users." This particular portion of the statement of policy relates to "navigation works" as such, as distinguished from earlier provisions referring to "the construction of works of improvement for navigation or flood control". Thus, this last clause, regardless of the limitations of later subsections, is

inapplicable to the present project, the first stated purpose for which is flood control (*supra,* p. 6).

Specifically, the stated policy is made applicable by subsection (a) to the investigation by the Army and the consideration by Congress of the construction of future projects. This subsection is by its terms not applicable in the present case since the project here was one approved by the Act itself. Even more significantly, even where the subsection will apply, it provides merely for the mechanics of securing proper consideration of the views of state authorities; it does not condition the project on obtaining state approval. This being so, it is not conceivable that Congress would require such approval for projects specifically authorized by it.

Subsection (b) provides for the maintenance and operation of existing works relating to navigation in such a way as not to conflict with certain state consumptive uses. This on its face has no relation to the construction of any dams or to the operation of works designed for flood control. And subsection (c) has no relation to the issue at all.

The Act goes on, in section two, to authorize and direct the building of the McGee Bend dam. No reference is here made to state approval. Rather it is a direct and positive instruction to proceed with the project, which is inconsistent with the existence of a condition precedent.

There is no history of a Congressional policy to subordinate national interests in navigation and flood control to the interests of the states in local matters.

References made in the petition to the Desert Lands Act of 1877 and a preceding statute, to the Reclamation Act and to cases thereunder, are clearly inapposite to the merits of this case. There is no basis in Section 8 of the Reclamation Act for argument that the states can interfere with the exercise by Congress of its plenary powers deriving from the Commerce Clause.[2] Of the other acts cited in footnote 5, page 8 of the petition, it is sufficient to say that the Federal Water Power Act contains no provision limiting the Federal commerce power; that this Court itself determined that nothing in the Boulder Canyon Project Act required the Government to secure permission of the State in order to build the dam (*Arizona* v. *California*, 283 U. S. 423); that Section 1 of the Flood Control Act of 1944 contains only the same language as, and is no more helpful to petitioner's cause than, the Rivers and Harbors Act here at issue; that the Water Pollution Control Act of 1948 recognizes only State rights which are theirs by virtue of their reserved police powers and not at all in conflict with an exercise of Congressional power under the Commerce Clause; and that Section 1311 (d) of the Submerged Lands Act of 1953, the section immediately preceding that cited by petitioner, preserves the plenary powers of Congress over navi-

[2] This Court's recent *Ivanhoe* decision shows that even under Reclamation law local law cannot operate to frustrate an authorized Federal project. *Ivanhoe Irrigation District* v. *McCracken*, No. 122, Oct. Term, 1957.

gation and flood control unimpaired and in no uncertain language. For that matter, it would be sufficient to state that none of these Federal statutes has anything to do with the construction of McGee Bend Dam.

As the Rivers and Harbors Act of 1945, properly construed, does not forbid the respondent officers from proceeding to construct the dam without first obtaining the consent of the State of Texas thereto, these officers were acting within the scope of statutory authority and the suit is in reality one against the United States, which has not waived its sovereign immunity.

2. There are additional reasons, not decided by the court below, why the dismissal of the action was plainly correct. The factual allegations of the complaint fail to state a claim upon which relief could be granted and certainly make no showing of irreparable injury. Furthermore, the Secretary of the Army is an indispensable party. If respondents are enjoined from constructing the dam, his actions will be controlled thereby because he is under a direction to prosecute this project "as speedily as may be consistent with budgetary requirements" (Section 2 of the Rivers and Harbors Act) and either he or a subordinate of his at his direction would then be obliged to take the affirmative action of seeking permission to build from the Texas Board of Water Engineers. But the Secretary is not, and cannot be made, a party to this action, *Blackmar* v. *Guerre*, 342 U. S. 512.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
DAVID R. WARNER,
ALFRED H. O. BOUDREAU, JR.,
Attorneys.

JULY 1948.